United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
STEPHEN F. SCHINDEL

76-7469

United States Court of Appeals

FOR THE SECOND CIRCUIT

PRATT & WHITNEY, Division of
UNITED AIRCRAFT CORPORATION,

Plaintiff-Appellant,

—against—

BURLINGTON NORTHERN, INC.,

Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

PRATT & WHITNEY AIRCRAFT, division of
UNITED AIRCRAFT CORPORATION

Plaintiff-Appellant

-against-

BURLINGTON NORTHERN, INC.

Defendant-Appellee

- X

On Appeal from the U. S. District Court
for the Southern District of New York

- -

REPLY BRIEF FOR PLAINTIFF-APPELLANT

- -

APPELLEE HAS FAILED TO SHOW THAT APPELLANT'S ACTION IS BARRED BY THE TWO-YEAR LIMITATION PERIOD.

The facts of the case at bar clearly take it out of the line of cases relied upon by appellee. In none of the cases relied upon by appellee had the carrier ever withdrawn or revoked its declination, or made a statement such as was made by Penn Central in this case, that the "claim was withdrawn from open account in error... We will finalize within 30 days." In the only two cases that are on point with the instant case, the courts have upheld the claimant's right to pursue its claim in the courts, despite the fact that each action was commenced more than two years after the carrier's first letter of declination.

All of the cases cited by appellee are readily distinguishable from the case at bar. Both B. A. Walterman v. Pennsylvania Railroad Co., 295 F. 2d 627 (6th Cir. 1961) and Shulman v. Superior Trucking Co., Inc., 3 Conn. Cir. 712, 223 A.2d 407 (1966) discuss only the nine-month claim filing requirement prescribed by the bill of lading and not the two-year limitation on filing suit, and hold that said filing requirement cannot be waived. These cases arose under completely different situations from that of the case now before

this Court, and presented different questions of law for consideration. Appellant does not take issue with either case.

The issue in both Burns v. Chicago, M., St. P & P. R. Co., 192 F. 2d 472 (8th Cir. 1951) and Holford v. Louisville & Nashville Railroad Co., 266 F. Supp. 408 (W. D. Tenn. 1967), was whether settlement negotiations and correspondence between the carrier and the claimant, after declination, tolled the running of the two-year limitation period. Nowhere in either case was it ever alleged that the railroad had withdrawn its declination or represented to the claimant that the subject claim was still open. In marked contrast to these cases is the case at bar, where the carrier repeatedly advised the claimant that its claim was under investigation and further advised the claimant at one point that its claim had been withdrawn from the carrier's open account in error.

Brewster v. Davis, 207 App. Div. 461 (4th Dept. 1924) and Lissberger v. Bush Terminal R. Co., 119 Misc. 691 (App. Term 1st Dept. 1922) both discuss primarily the nine-month limitation period on the filing of claims, and briefly discuss the two-year limitation period. In neither of these cases did the defendant give the claimant any indication

that it had withdrawn its declination, or that the claim had been reopened.

In Germini v. New York Central R. Co., 209 App. Div. 442 (1st Dept. 1924), the issue was whether the two-year limitation on the commencement of lawsuits was a bar to recovery against a connecting carrier other than the carrier that issued the declination. That is not the issue here. Plaintiff concedes that if its suit is barred, it will be barred as to all connecting carriers of the subject shipment. Germini is clearly not applicable here.

Defendant relies on L. M. Kirkpatrick Co. v. Illinois Central R. Co., 190 Miss. 157, 195 So. 692, 135 A.L.R. 607 (1940) in support of the proposition that there can be no waiver of the limitation provisions. The Kirkpatrick Court held that the suit was barred for the reason that a carrier may not by negotiations, letters and correspondence extend the time for suit beyond that limited by the bill of lading and the Commerce Act. 195 So. at 694.

In Kirkpatrick the carrier had merely "agreed to reconsider" the claim. 195 So. at 693. While appellant disagrees with the decision therein, the case is clearly distinguishable from the instant case, where the carrier notified the claimant that its claim was "... withdrawn from

open account in error." and would be finalized at a subsequent date. Appellant fails to understand how a claim that has supposedly been declined can be further "finalized". It is interesting, however, that even in Kirkpatrick there was a vigorous dissent by the Chief Justice of the Court. A portion of that dissent appears on pages 13 and 14 of appellant's initial brief.

Polaroid Corp. v. Hermann Forwarding Co., 541 F. 2d 1007 (3rd Cir. 1976) relied upon by appellee, deals primarily with the factual question of the adequacy of a notice of disallowance of claim, and arose under facts not at all similar to those of the case at bar. As with all of the other cases cited by appellee, the carrier in Polaroid never retreated from its initial position of declination.

Appellee, in attempting to minimize the importance of John Morrell & Co. v. Chicago, Rock Island and Pacific R. Co., 495 F. 2d 331 (7th Cir. 1974), states on page 17 of its brief that "the tenor of the majority opinion and parts of it are inconsistent in some respects with the line of authorities previously set forth." Appellant has demonstrated that the line of authorities set forth by appellee are not in point with Morrell or the instant case. Inconsistencies, if any, therefore are irrelevant. Furthermore, the facts of

Morrell are closer to those of the instant case than are those of any case relied on by appellee. The Morrell decision is the correct and equitable one for the particular facts of this case.

Appellee attacks the rules in Morrell and in Cordingley v. Allied Van Lines, Inc., 413 F. Supp. 1398 (D. Mont. 1976) for their lack of certainty. Appellant answers that while certainty is not to be ignored as a factor in formulating a rule of law, it should not be the overriding consideration, at the expense of fairness and close scrutiny of the facts of each case.

It is interesting that in the only cases that are factually similar to the case at bar, the results are the same as the result urged by appellant herein. Notwithstanding the different theories used by the judges to reach the same result, they clearly recognized the inequities that would result from the application of the limitation period without a consideration of the facts of the particular case.

While appellant is in agreement with the reservations expressed in Cordingley about the reasoning of the Morrell decision, the result reached in Morrell is the correct one. The Cordingley case also reaches the proper result and in addition uses a rationale that is responsive to the statute

and provides a workable rule. What such a rule sacrifices in certainty is more than compensated for by what it contributes to equity and simple justice.

CONCLUSION

For the reasons and authorities above set forth, and set forth in appellant's original brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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Service of (3) Copies of the within Reply Brief
is admitted this 5th day of Jan. 1977

Defendant - Appellee